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**No. 557**

Supreme Court,

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MAR 27 1970

E. ROBERT SEAVER

**In the  
Supreme Court of the United States**

**OCTOBER TERM, 1970**

**UNITED STATES OF AMERICA,**

*Appellant,*

**v.**

**INTERNATIONAL MINERALS & CHEMICAL CORPORATION**

**ON CERTIFICATION FROM THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT**

**BRIEF FOR APPELLEE**

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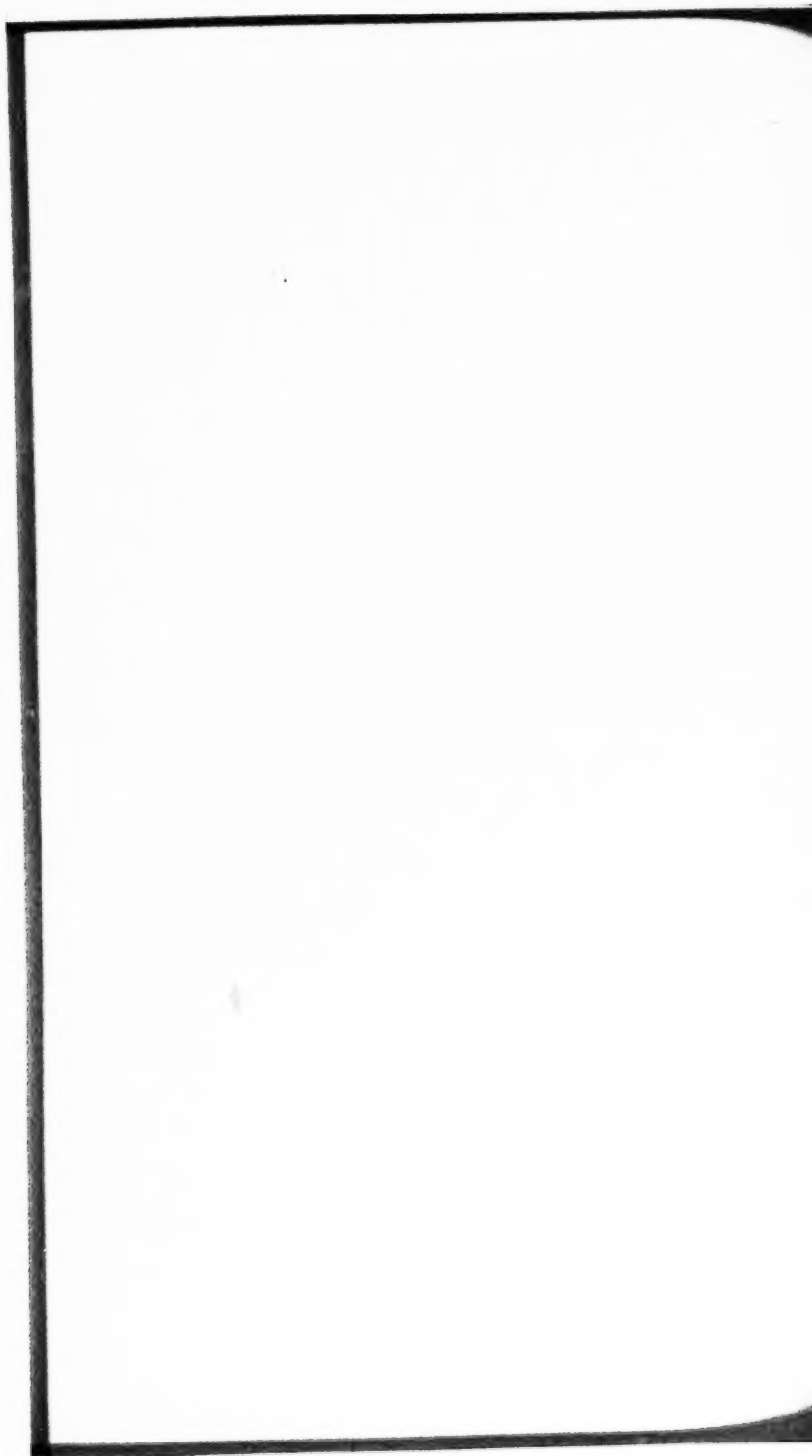
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**BRIEF FOR APPELLEE**

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**QUESTIONS PRESENTED**

Title 18 U.S.C. §834(f) provides that whoever "knowingly violates" any regulation of the Interstate Commerce Commission (now Department of Transportation) for the safe transportation of explosives and other dangerous articles shall be subject to fine and imprisonment. The information herein does not charge that the defendant knowingly violated a regulation but only that it "did

knowingly fail to show on the shipping papers the required classification" and, in two of the five counts, the proper name of an article offered for transportation, in violation of an applicable regulation. The district court dismissed the information because of the failure to allege that the defendant knowingly violated the regulation. The questions presented are:

1. Is an information purporting to charge an offense under 18 U.S.C. §834(f) sufficient if it alleges that the defendant knowingly failed to show on shipping papers covering interstate shipments of sulfuric acid and hydrofluosilicic acid the precise information required by a regulation of the Department of Transportation issued pursuant to 18 U.S.C. §834(a) but fails to allege that the defendant knowingly violated such regulation?

2. Are there no circumstances under which one who knowingly fails to show on the shipping papers the precise information required by a regulation of the Department of Transportation issued pursuant to 18 U.S.C. §834(a) could be found not guilty of knowingly violating such regulation?

#### STATEMENT

An information was filed against the defendant in the United States District Court for the Southern District of Ohio, Southern Division. The first four counts allege that the defendant, in violation of an applicable regulation of the United States Department of Transportation, "did knowingly fail to show on the shipping papers the required classification" (corrosive liquid) of sulfuric acid which defendant offered for transportation in interstate commerce. In addition, count 3 alleges that the defendant "did knowingly fail to show" the proper name of the article on the shipping papers. Count 5 is similar to

count 3 except that the article involved is hydrofluosilicic acid (App. 3-5). Defendant's motion to dismiss was granted by the district court on the ground that:

The information does not, however, charge that the defendant knowingly violated the above regulation. . . .

. . . knowledge of violating the above I.C.C. regulation is an essential element of the crime charged under 18 U.S.C. section 834(f).

Hence, failure to make such an allegation(s) in the information warrants granting defendant's motion to dismiss. *Rudin v. United States*, 254 F.2d 45 (6 Cir., 1958). (App., 8)

The district court did *not* rule, as stated in the Government's brief (p. 5), "that knowledge of the regulation itself, in addition to deliberate performance of acts constituting a violation, 'is an essential element of the crime charged.'" It held that "knowledge of violating the above I.C.C. regulation is an essential element," which is altogether different from what the Government states. Nor is it accurate to say that "the information was dismissed because it failed to allege that the defendant-shipper had knowledge of the regulation which allegedly was violated." (Gov't Br., p. 5) The information was dismissed because it failed to allege that the defendant "knowingly violated" the regulation.

#### SUMMARY OF ARGUMENT

We raise no issue as to the jurisdiction of the Court, although it is evident that this case involves the construction of a statute only in the broad sense that the dismissal of an information for failure to allege the essential elements of a statutory offense necessarily depends in every case on the court's determination from the words of the statute what the necessary elements of the offense are.

Contrary to the Government's statement, however, the district court did not, in any other sense, construe the provisions of 18 U.S.C. §834(f). The only statement in the opinion that could conceivably constitute a construction of the statute is the statement that "knowledge of violating the above I.C.C. regulation is an essential element of the crime." But this is simply a paraphrase of the "knowingly violates" language of the statute. The district court dismissed the information because it found it insufficient in failing to allege a knowing violation of the regulations. The district court did not consider what would constitute a knowing violation and it never reached the question posed by the Government of whether the statute "requires actual knowledge of the regulations and a specific intent to violate them." (Gov't. Br., p. 2). The district court's holding was that "knowledge of *violating* the above I.C.C. regulation is an essential element of the crime charged," which seems rather obvious since the statute imposes liability only on one who "knowingly violates" a regulation. The district court held only that a knowing violation must be alleged. Its citation of *Rudin v. United States*, 254 F.2d 45 (6th Cir., 1958), which discusses the tests for the sufficiency of an indictment, shows that it was passing on the sufficiency of the information rather than construing the statute.

A holding by this Court that the information here before the Court is sufficient to state an offense under 18 U.S.C. §834(f) would be tantamount to a holding that there are no conceivable circumstances under which one who knows he has not included in the shipping papers a specific item of information which happens to be required by a regulation of the Department of Transportation could be found not guilty of a "knowing" violation of such regulation. Since there is nothing before the Court but

the information and the motion to dismiss, the Court does not know the circumstances which led to the failure to include all of the required information on the shipping papers. The Government's brief assumes that the defendant did not know of the particular regulation, but this is only one of numerous possibilities, some of which might constitute a knowing violation of the statute and some of which might not. The Government's brief concedes that a possible explanation for the "knowingly violates" requirement of the statute is the reluctance of Congress to impose the severe penalties prescribed for an act which is inadvertent. (Gov't Br., p. 16). The only way a court can make an intelligent determination as to whether defendant knowingly violated the regulation is on the basis of the facts developed at a trial.

If the information in this case is sufficient, the word "knowingly" is written out of the statute. At the time of the 1960 amendment, Congress considered whether this should be done and determined that the requirement of a knowing violation should be retained in the law. The Government would now reverse that determination by using an information which eliminates that requirement.

## ARGUMENT

If, as we believe, the district court's holding that "knowledge of violating the . . . regulation is an essential element of the crime charged" is not a construction of the statute, but is simply a paraphrase of the statute, which imposes criminal liability only on one who "knowingly violates" a regulation, the correctness of the district court's dismissal of the information is so obvious that it requires no elaboration. The statute, by its express terms, punishes only those who knowingly violate a regulation; therefore, failure to allege that defendant "knowingly" violated the regulation is fatally defective. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342, 343; *St. Johnsbury Trucking Company v. United States*, 220 F.2d 393, 397 (1st Cir., 1955); *United States v. Chicago Express*, 235 F.2d 785, 786 (7th Cir., 1956); *United States v. Deer*, 131 F. Supp. 319, 320 (E.D. Wash., 1955); *United States v. Valenti*, 74 F. Supp. 718, 720 (W.D. Pa., 1947); *United States v. Debrow*, 346 U.S. 374, 376; *United States v. Seeger*, 303 F.2d 478, 482 (2d Cir., 1962); *Clay v. United States*, 218 F.2d 483, 486 (5th Cir., 1955); *United States v. Tornabene*, 222 F.2d 875, 878 (3rd Cir., 1955); Rule 7(c), 18 U.S.C. No case cited in the Government's brief is to the contrary. The arguments of the Government in support of its contentions here are simply not relevant to any question here before the Court.

Assuming, *arguendo*, however, that, as the Government argues, the determination of the district court was based on a construction of the statute, what was that construction?

Taking count 1 as typical, it was that a knowing failure to show on the shipping papers that sulfuric acid is classified as a corrosive liquid was not *necessarily* a knowing violation of the regulation. Stated a little differently, the court held that it may be possible for one knowingly to fail to show the classification required by the regulation without violating the regulation "knowingly."

The statute imposes heavy penalties on one who "knowingly violates" a regulation of the Department of Transportation issued pursuant to 18 U.S.C. §834(a). Under the Government's theory, it is necessary to allege and prove only a knowing failure to include on the shipping papers the precise information required by the regulation. In the present case, it would be necessary to show only that the defendant knew that the sulfuric acid was not described in the shipping papers as "corrosive liquid." No other circumstances bearing on whether defendant knew it was violating the regulation would be relevant.

If we are here dealing with a construction of the statute, the Court needs to consider whether there could be *any* circumstance under which a person who knew that he had not prepared shipping papers showing the classification as corrosive liquid could, nevertheless, be held to be not guilty of violating the statute. All sorts of possibilities of an unknowing violation of the regulation come readily to mind. For example, an individual who had never heard of regulations of the Department of Transportation in this field might make a single shipment in the course of a lifetime. It would not be unreasonable for him to assume that he could simply deliver the article to a common carrier and depend on the carrier to see that it was properly labeled and that the shipping papers were in proper order. Is it reasonable to assume that Congress intended that an individual be subject to imprisonment

under these circumstances? The Government, itself, recognizes that—

One possible explanation for the inclusion of the element of intent in 18 U.S.C. 834 is reluctance to impose penalties as serious as a year's imprisonment (or ten, if anyone is physically harmed as a result of the violation) for an act which is inadvertent. *Cf. Morissette v. United States, supra*, 342 U.S. at 256. (Gov't Br., p. 16)

In the case of a corporation, there are all kinds of possibilities. The failure could have occurred at any level. It might have been due to a failure to transmit instructions, or to a failure on the part of a subordinate to carry them out. The regulations are lengthy and complex, covering 760 pages in the Code of Federal Regulations, 49 CFR 69-839. The failure could have been due to misinterpretation of a regulation, to failure to learn of recent changes in regulations, to a misunderstanding of instructions by a subordinate or to mere inadvertence. These are just some of the possibilities. Others will undoubtedly occur to the Court. Some situations might impose liability while others might not. Some may be black or white and others may be various shades of gray. What the statute requires in the way of knowledge should be determined on the basis of a factual record and not on mere pleadings.

The Government, in effect, is asking the Court to strike the word "knowingly" from the statute, despite the fact that Congress expressly refused to do so when it amended the Act in 1960. Following the decisions in *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, and *St. Johnsbury Trucking Co. v. United States*, 220 F.2d 393 (1st Cir. 1955), the Interstate Commerce Commission (which then had the responsibility for the regulations) sought a number of amendments to the Act, including deletion of the word

"knowingly" so as to impose absolute liability for a violation of the regulations. In the 85th Congress, the Senate passed a bill (S. 1491) deleting the word "knowingly", and substituting therefor the words "being aware that the Interstate Commerce Commission has formulated regulations for the safe transportation of explosives and other dangerous articles." The bill was not passed by the House.

In the 86th Congress, the Commission again submitted a draft bill to the chairmen of the Senate and House committees on interstate and foreign commerce. While stating that it still preferred that the word "knowingly" simply be deleted from the statute, it recommended use of the "being aware" language which had been substituted for "knowingly" by the Senate in the 85th Congress as being a substantial improvement over the existing provisions. The Commission's memorandum recommending the Senate's substitute language is printed in the House Report (H. Rep. No. 1975, 86th Cong., 2nd Sess., pp. 7-11) and a copy of the relevant portions is attached hereto as Appendix A. It will be noted that the Commission deemed the amendment necessary to avoid the impact of the decisions in *Boyce Motor Lines* and *St. Johnsbury Trucking Company*.

The bill, as enacted by the Senate (S. 1806), contained the language "being aware that the Interstate Commerce Commission has formulated regulations for the safe transportation of explosives and other dangerous articles." The Senate report stated:

Prosecution for violations of the Commission's transportation of explosives regulations has been extremely difficult because of the requirement in section 835 of the act that violators must have knowledge that they violated the Commission's regulations. While the com-

mittee believes that every reasonable precaution should be taken to provide for punishing those violating a statute whose purpose is to promote safety, the creation of an absolute liability is deemed too stringent. (S. Rep. No. 901, 86th Cong., 1st Sess., pp. 2-3)

The House, however, refused to accept the Senate's language and resubstituted the word "knowingly", stating:

The present Transportation and Explosives Act requires that a violation "knowingly" be committed before penalty may be inflicted for such violation. Under the present law there is judicial pronouncement as to the standards of conduct that make a violation a "knowing" violation. The instant bill would change substantially the quantum of proof necessary to prove a violation since it provides that "any person who being aware that the Interstate Commerce Commission has formulated regulations for the safe transportation of explosives and other dangerous articles" is guilty if there is a noncompliance with the regulations. Such language may well create an almost absolute liability for violation. \* \* \* Since the penalties prescribed for violation of the Explosives Act are substantial and since proof required to sustain a charge of violation of such regulations under the bill would require little more than proof that the violation occurred, it is the considered opinion of the committee that such a substantial departure in present law is not warranted. It is the purpose of this amendment to retain the present law by providing that a person must "knowingly" violate the regulations. (H. Rep. No. 1975, 86th Cong., 2nd Sess., p. 2)

In spite of the foregoing language, the Government argues that the House committee thought that deletion of the word "knowingly" would make no difference in the meaning of the statute. It argues that the requirement of *scienter* is the same whether "knowingly" is deleted or not. The House committee thought otherwise. There

can be no question but that the "present law," from which the committee considered the Senate amendment would be a "substantial departure," refers to the discussion of *Boyce Motor Lines, Inc.* and *St. Johnsbury Trucking Co.*, in the ICC memorandum (App. A).

The Government's argument is based on a strained interpretation of what it mistakenly thought was a staff memorandum of the House committee on the judiciary. In fact, the memorandum was a memorandum of the staff of the Department of Health, Education and Welfare, which was attached to a letter from that department commenting on the bill, and which was published in the House Report (H. Rep. No. 1975, 86th Cong., 2nd Sess., pp. 14-19), together with the comments of other federal agencies. The Government misconstrues the memorandum and also erroneously states that the memorandum "urged deletion of the revised *scienter* requirement and resubstitution of "knowingly." (Gov't. Br., p. 21) The memorandum did urge deletion of the phrase "being aware" etc. (H. Rep. No. 1975, 86th Cong., 2nd Sess., p. 17). The memorandum continued with a general discussion of the *scienter* requirements of various statutes and concluded:

Plainly, it would be desirable, in the "interest of the larger good", to ease the Government's burden of proof of violation of a regulation promulgated under a statute regulating transportation of certain dangerous substances, a result we do not think is adequately achieved under the present language of section 834 of the bill. (Id., p. 19)

The HEW memorandum did not, however, as erroneously stated by the Government, advocate resubstitution of

"knowingly". The position of that department was that the statute should impose absolute liability for a violation of the regulation, as had been originally proposed by the Interstate Commerce Commission. The letter of the Secretary of Health, Education, and Welfare, transmitting to Congress the comments of the department, along with the memorandum of its staff, stated:

We believe that, as originally recommended by the Interstate Commerce Commission in the 85th Congress, the bill should penalize any person who violates a regulation, instead of requiring, as the bill would, that the violator had knowledge of the existence (though not necessarily the terms) of the regulations before a penalty can be imposed. To require such knowledge would create an undesirable precedent for other regulatory legislation designed to protect the public health and safety. (Id., p. 14)

But the views of the Interstate Commerce Commission and Health, Education, and Welfare did not prevail. The House insisted on resubstitution in the Senate bill of the "knowingly violates" language. Being fully aware of the "judicial pronouncements as to standards of conduct that make a violation a 'knowing' violation," it stated that its purpose in so doing was "to retain the present law by providing that a person must 'knowingly' violate the regulations." The Senate agreed to this resubstitution, thus retaining the language of the existing statute in this respect.

The Government now asks this Court to do what Congress expressly declined to do when it passed the 1960 amendments — to write the word "knowingly" out of the statute and apply the test of scienter which would apply had Congress amended the act to delete the word "know-

ingly"— so that all the Government would henceforth have to prove to establish a violation of 18 U.S.C. §834(f) would be that a violation of the regulation thereunder had occurred.

### CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be affirmed.

Respectfully submitted,

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March, 1971



# APPENDIX

APPENDIX

## APPENDIX A

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EXCERPTS FROM THE INTERSTATE COMMERCE COMMISSION'S STATEMENT OF JUSTIFICATION ACCOMPANYING ITS DRAFT BILL (IDENTICAL TO S. 1806 AS PASSED BY THE SENATE) SUBMITTED TO THE SENATE AND HOUSE COMMITTEES ON INTERSTATE AND FOREIGN COMMERCE, 86th CONGRESS, AND PRINTED IN H. REP. No. 1975, 86th CONG., 2ND. SESS., PP. 7-11.

[p. 9] In *Boyce Motor Lines, Inc. v. United States*, (342 U.S. 337), the Supreme Court reviewed the sufficiency of an indictment for a felony violation brought under section 835 of the act. The court stated at page 342:

"The statute punishes only those who knowingly violate the regulation. This requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the regulation would be so unfair that it must be held invalid. That is evident from a consideration of the effect of the requirement in this case. To sustain a conviction, the Government not only must prove that petitioner could have taken another route which was both commercially practicable and appreciably safer (in its avoidance of crowded thoroughfares, etc.) than the one it did follow. It must also be shown that petitioner knew that there was such a practicable safer route and yet deliberately took the more dangerous route through the tunnel, or that petitioner willfully neglected to exercise its duty under the regulation to inquire into the availability of such an alternative route."

In many prosecutions under this statute misdemeanor violations arise out of the failure to properly placard vehicles carrying dangerous cargo. The use of the words

## App. 2

"culpable intent" in the above quotation has been relied upon by defense attorneys and to some extent by the courts as requiring the establishment of some mental element or affirmative intention to evade the law in addition to knowledge of the facts.

In *St. Johnsbury Trucking Company v. United States* (220 F. 2d 393), a conviction resulted after trial in the district court wherein it was shown that there was no affirmative intention to violate the regulation but that the failure to placard the motor vehicle arose because of the failure of a rating clerk to attach a warning label to the shipping document which he, in turn, passed on to the billing clerk for preparation of a freight bill and delivery receipt. Clearly, there was knowledge of the fact that (1) the vehicle was carrying 3,550 pounds of wet electric storage batteries, and (2) it was not placarded. The following statement appeared in the opinion rendered by the district court:

"Thus, considering the purposes of section 835, the particular offense requires no element of criminal intent" (*U.S. v. Behrman*, 258 U.S. 280; *U. S. v. Balint*, 258 U.S. 250).

The circuit court set aside the verdict and remanded the case, holding that the above-mentioned quotation was in conflict with the decision of the Supreme Court as quoted from the *Boyce* case. The circuit court said:

[p. 10] "This statement [of the Supreme Court] conflicts with the statement of the trial court in the instant case that '\* \* \* the particular offense requires no element of criminal intent.' It may be true that 'culpable' and 'criminal' are not identical in meaning but it is clear that

### App. 3

the trial court erroneously interpreted 18 U.S.C. 835 as requiring no element of culpable or blamable intent and thus committed reversible error."

The concurring opinion of Chief Judge Magruder contains the following statements:

"If it be thought that the indicated requirement of proof will seriously hamper effective enforcement of the Interstate Commerce Commission regulations, the answer is that Congress is at liberty to fix that up by striking out from 18 U.S.C. 835 the prescribed element of mens rea—'knowingly'—as applied to violation of regulations of the sort here involved. That is to say, Congress could convert the offense into what sometimes has been called a public welfare offense, requiring no element of guilty knowledge or other specific mens rea, by providing that whoever, by himself or by agent, transports explosives, poison gas, flammable solids, or other dangerous commodities without the safeguards which may be prescribed by a lawful regulation of the Interstate Commerce Commission, shall be guilty of a public offense and subject to penalty. See the discussion in *Morissette v. United States* (342 U.S. 246, 252-260 (1952)).

"If a statute provides that it shall be an offense 'knowingly' to sell adulterated milk, the offense is complete if the defendant sells what he knows to be adulterated milk, even though he does not know of the existence of the criminal statute, on the time-honored principle of the criminal law that ignorance of the law is no excuse. But where a statute provides, as does 18 U.S.C. 835, that whoever knowingly violates a regulation of the Interstate Commerce Commission shall be guilty of an offense, it would seem that a person could not knowingly violate a

#### App. 4

regulation unless he knows of the terms of the regulation and knows that what he is doing is contrary to the regulation. Here again the definition of the offense is within the control and discretion of the legislature."

The deletion of the word "knowingly" in section 835 in the interest of the greater good places the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. Whatever the intent of the violator, the potential danger to society remains the same whether the violation is brought about by haphazard, careless conduct or whether it is prompted by an evil purpose. Mere removal of the word "knowingly" from the present wording of the statute would impose an absolute liability upon the carrier. Because of the added peril inherent in the transportation of the commodities concerned, statutory creation of an absolute liability does not seem unreasonable. However, the language recommended by the Senate Interstate and Foreign Commerce Committee in its Report No. 281, dated May 2, 1957, and substituted by the Senate in passing S. 1491 during the 1st session of the 85th Congress, has been incorporated in the attached draft bill. While the Commission is still of the view that simply deleting the word "knowingly" from this section of the statute is more desirable, it believes the substitution therefor of the words "being aware that the Interstate Commerce Commission has formulated regulations for the safe transportation of [p. 11] explosives and other dangerous articles" is a substantial improvement over the present provisions.

